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NOTE AND COMMENT.

THE EFFECT OF THE CARMACK AMENDMENT TO THE HEPBURN ACT UPON STATE LAWS AS TO LIMITATION BY CONTRACT OF THE AMOUNT OF THE LIABILITY OF A COMMON CARRIER.—Three recent decisions of the Supreme Court of the United States involving the construction of the Carmack Amendment to the Hepburn Act may be considered together, as the second was governed wholly and the third largely by the decision of the first. In the first case plaintiff delivered to defendant express company at Cincinnati, Ohio, a diamond ring consigned to Augusta, Georgia. The package was never delivered, and plaintiff recovered judgment in a Circuit Court in the state of Kentucky for \$137.52. Defendant thereupon sued out a writ of error to the United States Supreme Court. *Adams Express Company v. Croninger*, 226 U. S. 491, 33 Sup. Ct. 148, decided January 6, 1913. In the second case horses were shipped under a bill of lading limiting recovery to \$100 for each horse. Plaintiff in the United States Circuit Court of Appeals was given judgment for \$3024.38 for the loss of a mare and colt. *Latta v. Chicago St. P. M. & O. Ry. Co.*, 172 Fed. 850, 97 C. C. A. 198, 184 Fed. 987, 106 C. C. A. 664. The case was appealed and decided by the United States Supreme Court in *Chicago St. P. M. & O. R. v. Latta*, 226 U. S. 513, 33 Sup.

Ct. 155. In the third case a judgment for \$1315.50 for the loss of a stallion, shipped under a bill of lading limiting the carrier's liability to \$100, was upheld by the Supreme Court of the State of Nebraska. *Miller v. C. B. and Q. Ry. Co.*, 85 Nebr. 458, 123 N. W. 449. Upon appeal the case was taken to the Supreme Court of the United States. *C. B. & Q. Ry. Co. v. Miller*, 226 U. S. 33 Sup. Ct. 155. All three cases were reversed and remanded for further proceedings not inconsistent with the findings of the Supreme Court of the United States.

The principal opinion is given in connection with the *Croninger* case. Defendant express company in that case sued out a writ of error to the United States Supreme court on the ground that the act of Congress of June 29, 1906 (34 STAT. at L. 379 ch. 104) is the only regulation applicable to an interstate shipment. It claimed that the limitation of value to \$50, as declared in the bill of lading, was valid and obligatory under that act. Under the Kentucky law this limitation is invalid, and the shipper is entitled to recover the actual value of the thing lost, unless sufficient facts are shown in the case to avoid the contract for fraud, or to create an estoppel at common law. In reversing this judgment the court holds that the intent of Congress to take possession of the whole subject of the liability of a carrier under interstate shipments, and to supersede all state regulations as to that subject, so clearly appears from the Carmack Amendment of June 29, 1906, as to invalidate in all interstate shipments all state laws on that subject; and the provision in that amendment that nothing therein contained shall deprive the holder of the receipt or bill of lading of any remedy or right of action which he has under existing law, means under existing *federal* law, and does not continue in force any *state* laws. In accordance with this holding the *Latta* and *Miller* cases are also reversed and remanded.

The above proviso of the Carmack Amendment of the Hepburn Act has frequently been considered by the courts, and heretofore the conclusion has always been reached that the very purpose of the proviso was to save to shippers in certain of the states whose laws are more stringent than the common law, their more extensive rights against the carrier. Some of the cases have assumed that these rights under state laws were the only rights or remedies under existing law that could in any way be affected by this federal act. The proviso seems to have been suggested by the fact that congressmen from such states as Georgia, Kentucky, Texas, Iowa, Kansas, Nebraska, or some other states, in which carriers are forbidden to modify their strict liability, or to limit the amount of that liability, feared that this federal law might in some way supersede these state laws, and therefore secured the insertion of this proviso to prevent that result, and to save to shippers whatever rights and remedies they already possessed. On this point see *Latta v. C. St. P. M. & Q. Ry. Co.*, 172 Fed. 850, 97 C. C. A. 198; *A. T. & S. F. R. Co. v. Rodgers* (New Mex.) 113 Pac. 805; *Uber v. C. M. & St. P. R. Co.* (Wis.) 138 N. W. 57; *Adams Express Co. v. Green* (Va.) 72 S. E. 102; *Adams Express Co. v. Mellichamp* (Ga.) 75 S. E. 596; *Pace Mule Co. v. Seaboard Air Line Ry. Co.* (N. C.) 76 S. E. 513.

Numerous courts, since the passage of the Carmack Amendment in 1906,

have considered this proviso "that nothing in this section shall deprive any holder of such receipt or bill of lading of any remedy or right of action which he has under existing law", but not one has before regarded this as meaning existing federal law. It is difficult to find either in the congressional debates at the time, or in other consideration, any evidence that Congress, or any member of it, had any such idea. Apparently, when the Carmack Amendment was proposed it was seen that it might in some states give the shipping public even less protection than it already had, and accordingly this proviso was inserted to save the shipper all such rights. The result of the cases under discussion shows how well founded was this fear, but the interpretation adopted by the Supreme Court seems to leave the proviso lifeless. On the face of it, it appears like a bit of judicial legislation which leaves an important provision, enacted by the legislative branch of the government, quite useless. In view of the conspicuous position, certainly in recent years, of the Supreme Court of the United States for broad, progressive and common sense interpretations, this decision will occasion surprise to some. Very likely it means a further struggle for congressional action that may in the end go farther than the previous interpretation had carried the Carmack Amendment.

What right or remedy had the shipper under "existing federal law" which could in any way be affected by this section, and so call for this proviso? The only illustration suggested by the court is the right of a shipper to a remedy against a succeeding carrier in preference to proceeding against the primary carrier for a loss or damage incurred upon the line of the former. But it would seem that no proviso was needed for that. The body of the section makes any carrier receiving property for interstate shipment liable for injury caused by it or by any succeeding line, and this would seem to apply not merely to the first carrier so receiving it, but equally to any succeeding carrier so receiving it. *Balt. C. & A. Ry. Co. v. Sherber*, (Md.) 84 Atl. 72; *Tradewell v. C. & N. W. Ry. Co.* (Wis.) 139 N. W. 794, followed in *Uber v. C. M. & St. P. Ry. Co.*, (Wis.) 138 N. W. 57. It might, of course, happen that the last two carriers would lie wholly within a single state, and so as to them the shipment would not be interstate, but interpretations as to what constitutes interstate commerce would lead us to suppose that even in that case the federal act would apply. Unless it shall be held that the language of this section applies only to the carrier receiving the property *from the shipper*, i. e. to the first carrier, then the proviso adds nothing to the body of the section upon this point, and therefore is meaningless unless it applies to existing state law. In the *Croninger* case the court points out that before 1906 Congress had not legislated upon this question of limitation of the liability of the common carrier. It follows that this act was itself the only federal statute law to which the proviso could apply, and as the only common law administered in the federal courts is supposed to be the common law of the several states in which the cases arise, and since the court finds that this law was not covered by the proviso, there seems to be nothing left to which it can apply.

While this is the most startling result of these cases, there are other

matters directly decided, or implicitly involved, that are of great interest. Foremost is the conclusion upon which depend all the results of the cases, viz. that this legislation by Congress occupies the whole field and supersedes all the regulations and policies of a particular state upon the subject of the liability of a carrier under a bill of lading. The court finds that "almost every detail of the subject is covered so completely that there can be no rational doubt but that Congress intended to take possession of the subject and supersede all state regulations with reference to it." Some of the state courts had already so assumed, and had held that by this act carriers were forbidden any longer to make contracts in any way limiting their common law liabilities. See among others the recent case of *St. Louis, I. M. & S. Ry. Co. v. Pape*, (Ark.) 140 S. W. 265, following numerous previous Arkansas cases; *Ward v. Ry.* 158 Mo. 225, 56 S. W. 28, cited and approved in HUTCHINSON ON CARRIERS, 3rd. ed.) § 548. But this view has not been generally accepted. See especially three leading cases cited in the *Croninger* case: *Bernard v. Adams Express Co.*, 205 Mass. 254, 91 N. E. 325, 28 L. R. A. N. S. 293, and note collecting the cases on both sides of the question, 18 Ann. Cas. 351; *Travis v. Wells F. & Co.*, 79 N. J. L. 83, 74 Atl. 444; *Greenwalt v. Barret*, 199 N. Y. 170, 92 N. E. 218, 35 L. R. A. N. S. 971. This last case was appealed to the United States Supreme Court, but for some reason the appeal was not prosecuted. However, in the *Croninger* case it is cited with approval to the point that the Hepburn Act has had no effect on the common law right to contract with respect to the value of the article to be transported. If that be so, then it is hard to find ground for agreeing with the position that Congress has shown an intent to take over the whole field of contract limitations, and to supersede all state laws and regulations. For one illustration, on the question of limiting the amount of liability, the Hepburn Act seems to be silent, and there might therefore be room for state laws. In passing upon the Hepburn Act the New York court in the *Greenwalt* case found that the only "liability hereby imposed" was a liability for losses on connecting lines, and that any other liability might be contracted against the same as before the act. The court in the present case cites this New York decision with approval, though it does not refer to this particular part of the decision. But if the New York court is correct, then the legislation by Congress thus far on limitation of liability is very narrow. In any case, by the clear weight of authority it seems certain that it has not legislated on the limitation of the amount of the liability. The decision in the *Croninger* case therefore amounts to saying that the silence of Congress on that subject abrogates all state laws thereon, and gives full effect in all the states on interstate shipment to the rule of *Hart v. Pa. R. Co.* 112 U. S. 331, 28 L. ed. 717, 5 Sup. Ct. 151. This was not so before the passage of the Hepburn Act. Up to that time the federal courts followed the rule of the state in which the action arose. See *Pa. R. Co. v. Hughes*, 191 U. S. 477, 48 L. ed. 268, 24 Sup. Ct. 132; *C. M. & St. P. R. Co. v. Solan*, 169 U. S. 133, 42 L. ed. 688, 18 Sup. Ct. 289, both cited in the principal opinion.

Another question involved, but not explicitly disposed of, is that of a proper graduation of the charges for higher valuations. As pointed out in

a previous article, 8 MICH. L. REV. 544, any proper graduation would allow the increased charges to be enough, and only enough, to cover a reasonable charge for the added risk and care due to the greater value of the article carried. This doctrine has several times been approved by the courts, but no court ever seems to have gone farther and undertaken to determine how much that additional charge may reasonably be, nor to lay down the rules by which the question may be settled. In practice the additional charge seems usually to be made great enough to make certain that no one will be willing to pay it, and accordingly that all will ship under reduced liability. See *Ry. v. Lockwood*, 17 Wall. (U. S.) 357. The recent case of *Leas v. Quincy O. & K. C. R. Co.* (Mo. Appeals), 136 S. W. 963 is illuminating on this point. In that case a 25 percent addition in the rates was made for each 100 percent, or fraction thereof, of additional declared valuation per head above \$100. Defendant's general agent testified that in all his experience as agent he never knew of a single instance in which a shipper shipped at the higher valuation. In this *Leas* case it would have compelled him to pay in the particular shipment two and one-half times the rate actually paid. That might be a reasonable charge for additional insurance, but no one seems to try to show that it was. In the *Croninger* case the carrying charge for a \$50 valuation is 25 cents and for a \$125 valuation the charge would be 55 cents. To the uninitiated this seems an outrageous charge for the added insurance, especially when the carrier is not really insuring against loss, but only against loss due to his own negligence. That being absent, he would not be liable at all in either case or at either charge. The 25 cents it may be assumed was chiefly a charge for carriage with only a small element of cost for the risk. The 30 cent additional charge, however, must be almost wholly for additional insurance against the carrier's own negligence, for it does not appear that the carrier makes any material difference in the method of carrying the same package under the different valuations. On its face doubling the rate for double the value seems entirely unreasonable except in the business of pure insurance, and a study of the cases in which this question might have been considered shows that up to the present time neither the carrier nor the courts have ever made a scientific study of a reasonable graduation. See 8 MICH. L. REV. 544, and cases there discussed. A shipper who is offered a choice of shipping at a reduced value or paying an unreasonable increase for the real value, ought to be protected by the courts from the regulations of the carrier. It is really no choice at all. Probably the only satisfactory way of settling this matter will be by order of the Interstate Commerce Commission, after investigation that must necessarily require considerable time.

One further point may be noted. Do these cases indicate that the Supreme Court of the United States, when the question is squarely before it, will hold that a stipulation limiting the amount of recovery to a fixed value is valid, whether it is shown to be an arbitrary preadjustment of damages irrespective of the actual known value of the goods, or a bona fide effort to place a true value on the shipment? The court cites with approval the opinion of the Interstate Commerce Commission in *Re Released Rates*, 13

I. C. C. R. 550, to the point that a carrier rate may be graduated by value. Does it also approve the opinion of Commissioner LANE in that case that such a graduation is void when it has no reference to the actual value of the goods as known by the carrier? The *Croninger* case does not necessarily involve this question, for it seems that the package was sealed and the carrier did not know its content or value. If the charges had been properly graduated, as they probably were not, then in equity as well as in law, recovery ought to be limited to the amount stated. Possibly the same may be true of the second case, the *Latta* case, in which the lower court awarded the judgment of \$3024.38 for the loss of a mare and colt. The facts do not show whether the carrier's agent knew their real value, or that they were worth more than \$100 each. *Latta v. Chicago, St. P. M. & O. R. Co.*, 172 Fed. 850, 97 C. C. A. 198. The *Miller* case, however, is not so easily disposed of. In a Nebraska court the plaintiff had recovered the full value, interest and costs, amounting to \$1315.50, for the loss of a stallion shipped under a bill of lading placing a value of \$100 upon the animal. On the ground that it must be governed by the federal, and not by the Nebraska or Iowa law, the case was reversed and remanded for further proceedings not inconsistent with this opinion. The court would hardly have reversed the case, if the judgment was correct, because it had been tried under the wrong law. It would seem as though it must almost be a matter of judicial knowledge that a stallion worth shipping from Iowa to Nebraska must have been worth more than \$100, and that the agent of the carrier must have known that fact when the contract was made. Under that view of the situation the Supreme Court of the United States would seem to uphold the decision in *George M. Pierce Co. v. Wells F. & Co.*, 189 Fed. 561, commented on in 10 MICH. L. REV. 317, and in *Mering v. So. Pac. Co.* (Cal.) 119 Pac. 80. However we cannot be sure that the real value did appear, even in this case, or that the agent or carrier saw the animal that was shipped, and therefore this case hardly, even by necessary implication, decides the question of whether a contract limiting the value for the purpose of shipment to an amount known to the agent of the carrier to be much less than the real value, will be upheld by the court. If the *Pierce* case should be approved, then it seems probable Congress will again be called upon by further statutes to protect the shipper from the powerful carrier, with whom he deals upon such unequal footing that it strains the meaning of words to say that there is any real contract between them. See the very recent cases in a Colorado Court of Appeals, *Col. & S. Ry. Co. v. Manatt*, 121 Pac. 1012, following *U. P. R. Co. v. Stupeck* (Colo.), 114 Pac. 646; in Tennessee, Senator CARMACK'S home state, *Drake v. Nashville C. & St. L. R. Co.*, 148 S. W. 214; and in Texas where the *Hart* rule is denied *in toto*, *Galveston H. & S. A. R. Co. v. Critten*, (Texas Civ. App.), 147 S. W. 361. Further decisions on this question will be awaited with interest.

E. C. G.

WAIVER BY THE DEFENDANT OF HIS RIGHT TO BE PRESENT AT HIS TRIAL.—
In these times when so much adverse criticism is being directed against the courts and their methods of procedure, the attention of lawyer and law-